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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELROY WULFENSTEIN,
HOWARD H. CARTER and
JOHN WHITNEY,
Plaintiff and Respondent,

vs.

ELLIS LARSON and
ORA H. LARSON, his wife,
Defendant and Appellant.

Case No.
13617

BRIEF OF RESPONDENT

Appeal from the Judgment of the Fifth Judicial District Court for Washington County, Utah
The Honorable J. Harlan Burns, Judge

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JUL 2 0 1974

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELROY WULFENSTEIN,
HOWARD H. CARTER and
JOHN WHITNEY,
Plaintiff and Respondent,

vs.

ELLIS LARSON and
ORA H. LARSON, his wife,
Defendant and Appellant.

Case No. 13617

BRIEF OF RESPONDENT

NATURE OF CASE

This is an appeal from a Judgment and Decree of Specific Performance entered in the above entitled case in favor of the plaintiffs. It was found that the defendants did sign an option for the sale of realty, and the plaintiffs exercised the option properly and were entitled to have the same performed.

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DISPOSITION IN LOWER COURT

The case was tried before the Honorable J. Harlan Burns, District Judge, on the 29th day of October, 1973. He awarded judgment and a decree of specific performance in favor of plaintiffs. He ordered performance of the option for purchase of realty, with a finding that the option had been exercised in accordance with the terms thereof.

RELIEF SOUGHT ON APPEAL

Defendants seek to have this Court set aside the decree of specific performance and by this response, Respondent seeks that the decree of the lower court be affirmed.

STATEMENT OF FACTS

We must supplement the Statement in Appellant's brief so the Court will have a more complete understanding of the facts in evidence which relate to the issues.

The option is for 1040 acres of ranch land for $100,000.00. Five Hundred Dollars (Exh P-2) was paid down when the option was signed and retained by defendants. The first payment of $10,000.00 was tendered into escrow as scheduled. The facts surrounding the exercise of the option are the basic issues before the Court in this appeal. The Option (Exh P-1) is dated

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March 8, 1971, and required exercise "at any time before March 8, 1972 at 5 o'clock P.M." This was exercised by deposit of $10,000.00 in escrow, as required, on March 4 at Southern Utah Title Company, and sending a written notice to defendants by certified mail.

The letter of exercise of the Option (Exh P-3) is dated March 4, 1972, and attached thereto is the Receipt for certified mail, showing its deposit in the St. George Post Office, certified mail, properly addressed to the defendants, on March 6, 1972, two days before the end of the Option. March 6, 1972 was a Monday.

Exh P-4 is a copy of the Post Office form, Notice of Attempted Delivery left at the defendants' home on March 7, 1972, and receipt of the envelope March 13, 1972. The testimony of the Postmaster was that the certified mail communication was duly received on Monday, March 6, and the delivery was attempted on March 7. As the defendants were not at home, the notice (Exh P-4) was left at their home. The defendants did not come to the Post Office to pick up the envelope until March 13. Obviously the defendants had received the notice, as it was taken to the post office on the 13th, and defendant Ellis Larson signed for the envelope at that time. Receipt of the Notice of Attempted Delivery on March 7 was not denied by defendants. They were not at home when the postman came by, and elected not to go to the post office until the next week and pick up the letter of exercise of the option. Defendants did not go to Southern Utah Title Company and pick up the

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check for $10,000.00 out of the escrow, nor submit the Uniform Real Estate Contract as required, but advised plaintiffs that it was too late.

On the issue of the execution of the Option and the alleged changes, appellants' statement of facts fails to make mention of the undenied fact that the appellants had a copy of the Option for nearly a year before the exercise of the option, and had made no complaint about its contents. In fact, Exh D-1 is the copy of such Option which the Larsons had *received by mail* after it was notarized, and which they held from March, 1971, and it is complete. Apparently hoping to get more money, Ellis Larson had gone to Mr. Wulfenstein's home in December, 1971 to talk about a change in the payment schedule, a thing which he would not have done if he had not known of the contents of the Option at that time. No claim was made of an unauthorized filling in when they met in December, 1971.

The only change in the document was the one made at the time of signing, when the number of acres was reduced by writing over the typed figures of 1140 acres, the figures 1040, in ink, and Mr. Wulfenstein then wrote beside it his first name, "Elroy," to reflect that he acceded to the reduction of the acreage. There was no reason for the Larsons to initial this, as it was a reduction of the acreage being subjected to the Option.

The option is a printed form which requires, "This option shall be exercised by notification in writing to the Party of the First Part." No alteration of this part

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of the form was made by either party. Appellants did not alter this to require hand delivery or any specific method of transmission of the writing.

ARGUMENT

POINT I

OPTION WAS EXERCISED WITHIN THE TIME AND IN THE MANNER ALLOWED BY LAW.

The printed Option form used by the parties is silent as to the method of transmittal of the "notification in writing." It establishes Southern Utah Title Company as the "Escrow Agent" and directs the procedure for disbursement of the funds that were deposited at the time of the exercise of the option. The $10,000.00 was deposited on or prior to March 4, 1972, the same date as the letter of notification of exercise of the option—four days prior to the expiration date.

It is to be observed that in the Memorandum Decision issued by Judge J. Harlan Burns (R 91-96) he emphasizes that the copy of the Option (after notarization by Mr. Howard Carter of Southern Utah Title Company) was mailed to the Larsons. Mr. Larson says that he received such by mail and put it away. Thus a course of communication was established and accepted by the parties at the inception. It therefore was not unusual, when the $10,000.00 was deposited with the escrow agent, for the written notification of exercise of the option to be given by U.S. mail.

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Because of the deadline set forth in the Option of 5:00 P.M. March 8, 1972, this was sent by certified mail on March 6, and delivery was attempted on March 7, with written notification being left at the Larsons' home on March 7. Defendants have not explained why they did not pick up the envelope the next day. They have emphasized the nearness to the post office and the office of Southern Utah Title Company. The only assumption that can be made is that defendants imagined that by perversely delaying the pick-up of the letter until after the 8th, the option would lapse.

As the trial court has said in his Memorandum,

> The pivitol issue raised by the facts found and above recited by the court, is one of whether or not the mailing of the notice 48 hours prior and the attempted delivery by postal authorities one 24 hour period prior to the date in time the option expired, was sufficient notice of acceptance to mature the option contract under the law of this state.

It is to be observed that the plaintiff had made a timely deposit of the $10,000.00 in escrow as required by the option, and had mailed the notice of exercise of the option in a timely manner. Any delay in receipt thereof was solely the result of the acts of the defendants in attempting to defeat the option itself. Their motivation is obvious in their resistance to the completion of the transaction and their refusals which have made necessary this present litigation.

The mailing of the exercise of the option, coupled

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with the affirmative step of depositing the $10,000.00 in escrow in a timely manner, was an effective act constituting acceptance of the offer of sale, which would be a legal characterization of an option. The prior conduct of the parties in transmitting the original option to the defendants by U.S. mail, without any objection or protest by the defendants, indicates the fact that no other method of communication was intended, designated or required by the option. The defendants emphasized the fact that St. George is not a large community and that the residence of the defendants was not far removed from either the office of the Southern Utah Title Company or the U.S. Post Office, or for that matter very far from the residence of the plaintiff. Notwithstanding this, an orderly and responsible proceeding for giving "written notification," as required by the option, is by certified mail deposited with the U.S. postal authorities.

The testimony of the postmaster established the diligent manner in which they received the written notification, as evidenced by the stamp on the receipt given at the time that the fee for the certified mail was paid, the notification given on the following date of the attempted delivery and advising the defendants to come to the post office and pick up the certified mail communication, and the safe keeping of the same until the defendants did come to the post office and sign for the document. The only excuse (and we believe a rather lame excuse) that was given by the defendant, Ellis Larson, for not picking up the notification earlier, was

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that he was "too busy." If he was really that busy, it would have been fruitless for the plaintiffs to attempt hand-delivery to him at his residence, and they used the only practical and realistic method available, namely the U.S. postal service.

There is some split in authority as to whether or not the deposit of the notification in the mail is the critical factor, or whether the actual receipt of the notification is essential, before the option has been exercised. We know of nothing in the state of Utah that would negative the use of U.S. mails for the giving of a "written notification." We would assume that it has been the experience of all that most written communications are made by the use of the mails, rather than by hand delivery or through the engagement of an independent courrier.

In *Morello v. Growers Grape Products Association*, 186 P. 2d 463, it is held that the contract is complete when a letter of acceptance is posted, absent any provision in the offer requiring the letter of acceptance to be received. This appears to be a rule recognizing the realities of life that such is a common and generally accepted procedure. In our present case the parties themselves had more or less established this method of communication, as the written option was taken to the office of Mr. Howard Carter for notarization; he called the defendants on the telephone to verify their signing of the same, and then performed the notarization (a method which the trial court felt to be less than desir-

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able) and then mailed the copy to the defendant. The defendant Ellis Larson put it away and made no objection to that method of transmittal of the option itself.

Had the defendants desired that there should be placed in their hands and received by them the letter of notification, they could have inserted such into the contract prior to signing, but such was not deemed essential, apparently, by them, or of any critical nature, or perhaps it was not even considered by them at the time of the signing of the option. It is to be observed that this was a printed form and the delict of specifying the method of transmittal is not to be blameworthy toward either party who has signed the document. The testimony in the record shows that the blanks were filled out by Mr. Howard Carter of Southern Utah Title Company, at the instance and request of the plaintiff, so as to the typewritten portion if there were ambiguities or uncertainties such might be attributable to the plaintiff. But no such contention is made and no such ambiguities exist in the typewritten portion of the document.

In 17 Am. Jur. 2nd Supp. page 27, we have two citations which affirm on a rather current basis the trend of the courts toward the position that the mailing of the exercise of the option or the acceptance of the offer in regular manner with the postal authorities, constitutes the acceptance itself.

> Where a letter confirming exercise of option to purchase was mailed within the period of option, it constituted the valid acceptance of the offer under the terms of the option, even though

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the letter was received after the period had expired. Re Crossman's Estate, 231 Cal. App. 2d. 270, 41 Cal. Rptr. 800.

> The well-established rule is that in the absence of any limitation or provision to the contrary in the offer, acceptance of an offer is complete and the contract becomes binding upon those parties when the offeree deposits acceptance in the post box. *Reserve Insurance Company v. Duckett*, 249 Maryland, 108, 238 A. 2d. 536.

What really is happening is that the defendants are trying to impose into the contract new terms and conditions by their own construction of the contract and by their own testimony, namely that there had to be a written notification of the exercise of the option delivered to them prior to the expiration date. In a recent decision by your court, *E. A. Strout Western Realty Agency, Inc. v. Broderick*, April 30, 1974, the court construed a listing agreement between a vendor and a realtor. Though the issues are not the same, the holding is significant and in line with the prior decisions of this court, namely that by defendants' self-serving oral declarations and self-serving construction, the written contract between the parties may not be altered or changed.

> . . . However, under the general rule, which is applicable here, parol evidence may not be given to change the terms of a written agreement which are clear, definite and unambiguous. To permit that would be to cast doubt upon the integrity of all contracts and to leave a party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who in the

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subsequent light of events discovers he has made a bad bargain.

> Written words can be examined so as to ascertain what they stand for in connection with particular conduct or particular objects. Thus expressions of the parties prior to and contemporaneous with the execution of the written instrument may be helpful in understanding the meaning of the language used. However, the defendant here does not seek to explain the meaning as a paragraph. He simply wants the court to eliminate it in its entirety. This the courts cannot do.

Thus we believe that this court will agree with the decision of Judge Burns, namely that in light of the absence of any specifics in the printed option form as to how the written notification should be given, that the conduct of the parties theretofore in having the option delivered within St. George by U.S. mail is consistent with the conduct of the buyer in exercising the option and giving written notification, after the deposit of the $10,000.00 in the escrow created by the option, likewise by use of the U.S. postal facilities. The utilization of certified mail was a further step in attempting to assure that the purchaser had a record of when the document was deposited with the post office, two days prior to the expiration of the option date.

Some point is made in the brief of the appellant under Point II that the option was plaintiffs' document and was not interpreted against them by the trial court. This seems a very unusual assertion, in that the area that is in dispute, namely the method of transmittal of the

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written notification of the exercise of the option, is a part of a printed document, a form that has been used by many people in the community and in many other areas, and is not something unique to plaintiff, though plaintiff did supply the document for execution by the parties. The printed form was used and the dispute does not relate to the portions that are filled in, as such is not an element that would call for any construction or interpretation against the plaintiffs. Had the typed-in portions of the contract been ambiguous, conflicting or uncertain, then perhaps parol evidence could have been adduced by the parties to clarify the same, and had a difficult ambiguity still remained, then the court would have a duty to construe the same against the drafter thereof. No attempt was made in the course of the trial to impose this upon the court, and the court wisely ascertained that this was not the type ambiguity that called for an adverse construction contrary to the evidence and the postal records.

POINT II

OPTION WAS NOT VOID AND NO ALTERATIONS WERE MADE CONTRARY TO INSTRUCTIONS.

This whole segment of the case appears to be predicated upon the hypothesis that the document was not completed at the time of signing, and that thereafter it was filled in contrary to instructions other than the authorization given by the defendants. It is to be observed

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that the references made in the brief dwell on the visit made by Mr. Larson to Mr. Wulfenstein around Christmas, some nine months after the time of the signing of the option and the delivery of the copy of the option to the Larsons. Apparently it was getting toward the end of the year and Mr. Larson was reviewing his tax problems, had re-evaluated whether he wanted to sell the property or not, and had gone to Mr. Wulfenstein to negotiate different terms. No different terms were ever agreed upon and the option was never altered, and the option as signed is the one that was introduced into evidence.

The fact that Mr. Larson had the option from March, 1971 until the time of the initiating of this law suit after the exercise of the option, without making any complaint as to the purported improper filling-in of the blanks, seems very significant to us, and we believe was of importance in the mind of the trial Judge in making his decision. The trial Judge had the opportunity of seeing Mr. Larson, observing his demeanor and hearing his testimony and drawing conclusions from such, a province which this court does not have. Even with the dry record of the transcript, it shows clearly that it was not until Christmas that Mr. Larson discussed with Mr. Wulfenstein a possible different method of payment for the property, rather than the $10,000.00 at the time of the exercise of the option.

There are contradictions in the testimony of Mr. Larson at page 77 of the record, wherein he states that

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he went to Mr. Wulfenstein's home about Christmas time, and that he discussed a different method of payment and was first assured that he could have his money any way he wanted it, but when defendants' counsel asked him whether or not Mr. Wulfenstein had said that he could have the 29% down, Mr. Larson then said that Mr. Wulfenstein said no, that he didn't say that. He then stated that he made no effort after the signing of the option in March until that Christmas to discuss any alteration in the terms of the option.

The items which they contend were filled in contrary to instructions are

(a) The utilization of Southern Utah Title Company as the escrow agent, though no other escrow agent was ever named, designated or even represented to be desired by the defendants; and

(b) As to the $10,000.00 down and the annual $10,000.00 payments plus interest.

The testimony of Mr. Howard H. Carter and the testimony of Mr. Wulfenstein were that the blanks had been filled in completely prior to the time of the presentation of the document to the Larsons for signature in March of 1971. Mr. Carter is the manager of Southern Utah Title Company and he is the one who typed up the option on the printed form prior to its submission to the Larsons, and also he is the one who notarized the document and talked with the Larsons by telephone immediately following the signing of the same. Also he is the

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one that transmitted by mail the copy of the document to the Larsons. Perhaps we should review the contention that the document is void because the blanks were filled in, in light of the Utah law relating to the same. (It is not conceded that the blanks were in existence at the time of signing, but assuming such for the purpose of this argument only.) This court has decided that if a document is signed in blank and the blanks are filled in in pursuance of the instructions, that no prejudice results to any party and that such does not make the document void. This general principle is reaffirmed in the *E. A. Strout Western Realty Agency, Inc. v. Broderick* (supra). There it was stated that parol evidence may be received to clarify ambiguous language in a contract, to show what the agreement was relative to filling in blanks and to supply omitted terms which were agreed upon but inadvertently left out of the written agreement. The case of *Fox Film Corp. v. Ogden Theater Co., Inc.*, 83 Utah 279, 17 P. 2d 294 is cited. In our present case the defendants merely contend that these were blank, and do not attempt to explain that they should have been filled out with different terms. It was not until nine months later, namely Christmas of 1971, that Mr. Larson stated that he wanted 29% down. Apparently they would have the court believe that the method of payment for the property was never discussed except in generalities, and that they signed the contract giving the option of purchase without any specification as to the method of payment. The document in its printed form clearly calls for an escrow agent and

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for the payment of the money to the escrow agent and disbursement by that escrow agent, and yet the defendants have not suggested any other company to act as the escrow agent, or that there was any agreement that some other company should act as an escrow agent.

Certainly in the interest of a completed contract the logic is absolutely on the side of the plaintiffs that the identity of the escrow agent be named and that the method of making the payments upon exercise of the option be named. In the *Strout Western Realty Agency v. Broderick* case, supra, the court found that even though some items on the back of the agreement were blank, that such was not fatal to the basic concept in that case that if there was a sale of the property a commission was to be paid to the realtor. Likewise, in our present case the court in the trial of the matter found that there was a completed document, that the blanks had been filled in prior to the signing, and that this was the agreement of the parties. As has been said many times before, the advantageous position of the trial judge will be honored by this court when the trial judge has seen the demeanor of the witnesses, heard their testimony and been able to reach the findings, conclusions and decree based upon such. The judgment of the trial court in matters of this nature will not be overturned by this court unless there is a clear error and unless there are matters in evidence that undeniably require a different conclusion by the trial judge. Such is not the circumstance in this case.

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The document was completed, according to the testimony of two of the witnesses, prior to the time of signing. The variances in the darkness of the type in parts of the document, which defendant asserts is proof that the matter was typed in at a later date, were fully explained by Mr. Carter, in that he frequently takes documents out of his typewriter as he goes along and as information comes to him, and replaces them with others, and then puts the original one back in to complete his typing, and that nevertheless he was certain that all of the blanks were completed prior to the time that it was given to Mr. Wulfenstein to take out for the signature by the Larsons in March of 1971.

CONCLUSION

The purpose of the present case is to require the defendants, Larsons, to complete their agreement to sell the ranch for $100,000.00. Specific performance was decreed by the Court and plaintiffs stand ready and willing to perform. The $500.00 for the option has been retained by the defendants and the $10,000.00 is still in the hands of the designated escrow agent.

We urge that the decision of the trial Court be affirmed. The defendants will have the benefit of their bargain, namely $100,000.00, and the plaintiffs will be allowed to acquire title. The trial Court has carefully weighed the evidence and issued his Memorandum De-

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cision, and then caused the Findings, Conclusions and Judgment to be made and entered. Such is in harmony with the relevant laws, decisions and rules of equity.

Respectfully submitted,

PUGSLEY, HAYES, WASKISS,
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By Harry D. Pugsley

Attorneys for Plaintiffs

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